No. 93-519

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1993

FEDERAL ELECTION COMMISSION,
Petitioner,

v.

LYNDON H. LAROUCHE AND DEMOCRATS FOR ECONOMIC RECOVERY-LAROUCHE IN '92,
Respondents.

BRIEF IN OPPOSITION AND APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION AND APPENDIX TO PETITION FOR WRIT OF CERTIORARI

James F. Schoener*
1712 Glenhouse Dr.
Apt. 315
Sarasota, FL 34231
(813) 966-6920

Richard Mayberry
888 Sixteenth St., N.W.
Suite 500
Washington, DC 20006
(202) 785-6677

Attorneys for Respondents Lyndon H. LaRouche and Democrats for Economic Recovery-LaRouche in 92

Counsel of Record
October 29, 1993

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the provisions of the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042, permit the Federal Election Commission to inquire into the *bona fides* of a candidate's promises made in a candidate's eligibility agreement executed under the statutory provisions of 26 U.S.C. § 9033(a).

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Respondents, Lyndon H. LaRouche and Democrats for Economic Recovery-LaRouche in 92 ("LaRouche" and "the Committee") respectfully submit this brief in opposition to the petition of the Federal Election Commission ("FEC" or "Commission") to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Lyndon H. LaRouche and Democrats for Economic Recovery-LaRouche in 92 v. Federal Election Commission*, 996 F.2d 1263 (D.C. Cir. 1993).

Respondents accept Petitioner's identification of the Opinion Below, statement of Jurisdiction, and citation of the relevant statutes and regulations, with the notable exception that Petitioner has failed to include the most important reference to the First and Fifth Amendments to the Constitution of the United States.

MISSTATEMENTS OF THE CASE

In accordance with Supreme Court Rule 15.1 Respondents address all perceived misstatements of fact and law in the Commission's petition ("Pet."). The unadjudicated allegations of its Subsections C and D (Pet. 6-11), and its representation of the appeals court's decision at 13-16, are neither relevant nor accurate. See below, Respondent's Brief Subsections B and C, at 3-12. It is also to be noted, that eight pages of Petitioner's Statement of the Case have nothing to do with the "sole issue" addressed by the court below, but are instead a recitation of facts previously alleged by Petitioner, but deemed irrelevant by that court. Petitioner does not argue that the court erred by not taking up this recitation. Indeed, Petitioner attempts to induce this Court to believe the unsupported inference that the appeals court acquiesced to those alleged facts (see Subsection A, below).

A. Petitioner Misrepresents the Court Below

1. The Court Did Not Adopt Petitioner's Statements of Facts

Petitioner attempts to convey a misimpression that the court below made a finding of fact with regard to the FEC's allegations of LaRouche wrongdoing, asserting that "[t]he court of appeals did not question the facts upon which the Commission relied" (Pet. 16). On the contrary, the court determined that Petitioner's case did not rise to the threshold at which such facts needed to be tried. The court, therefore, "did not question the facts" not because it considered them to be true, but because even if true they were irrelevant to the "sole issue" before it, such that even when "assumed" to be valid "for purposes of this case," they added nothing to Petitioner's legal argument (Petitioner's Appendix ["Pet App."] 4a). As the court clearly set forth,

> [t]he sole issue before us is whether the Matching Payment Act permits the Commission to withhold matching funds on the basis of its assessment of evidence leading it to distrust the agreements and commitments made by an applicant under §§ 9033(a) & (b).

Pet. App. 6a.

The alleged facts set forth in Petitioner's Subsections C and D, therefore, do not constitute any portion of the appeals court decision for which Petitioner seeks a writ, and should be ignored by this Court.

2. Petitioner Misrepresents Both Majority and Minority Opinions

Petitioner not only represents as "facts" in the case, its own allegations never tried by the court below, but goes on to misrepresent the court's opinion, substituting the words of Judge Wald's partial dissent for those of the majority, while simultaneously misstating the Judge's own representation of the majority (Pet. 15). What Judge Wald actually said of the majority at the cited section was,

> the majority accepts the Commission's determination that the candidate whose agreements contain impermissible qualifications has not "established" his eligibility,

which is not and never was at issue in this case. She did not here state, as Petitioner alleges, "that the majority had agreed that the Commission could reject formally correct candidate promises...." Petitioner therefore necessarily omits Judge Wald's qualifying and subordinating "I believe" in representing the immediately ensuing quotation, thus portraying the passage as if it were not simply her dissenting opinion, but that of the majority as well. Pet. App. 15a. It goes without saying that Petitioner should not misrepresent the decision of the court below; still less should Petitioner suggests it was the court minority, not itself, who made the misrepresentation.

B. Petitioner Misrepresents the History of LaRouche's Campaign Financing Activity

1. Overview

Petitioner further seeks to mislead this Court by the emotion-laden terms in which its alleged facts are cloaked.

Subsections C and D reflect the long and stormy relationship Petitioner's Office of General Counsel has had with Respondent LaRouche, as is evidenced by the repeated use of the terms "fraud," "repudiated promise," and "irregularity," lacking the legal precision to be expected from a General Counsel for such an important agency. It is **flatly wrong** that LaRouche "either repudiated his promises or engaged in other fraudulent behavior to obtain matching funds" (Pet. 6) -- even were that to be relevant. The recital of each campaign, starting in 1976 -- when no public funds were granted -- through the most recent events, makes it appear that the usual errors and mistakes common in **all** presidential campaigns have become in the eyes of Counsel -- only in Mr. LaRouche's case -- a matter of "fraud."

The General Counsel further makes the **right** of a candidate to question rulings of the Commission in court -- in Mr. LaRouche's case -- a matter of "repudiation of promises," while other candidates including Presidents Carter, Reagan, and Bush, and Senators Kennedy, Mondale, and Glenn can challenge the Commission without incurring such a stigma. Most recently Pat Robertson and Senator Robert Dole have also questioned the audit reports of Petitioner in the same manner as Mr. LaRouche. All of the above candidates, in order to obtain federal funds, have signed the same or similar letters to that executed by Respondent; yet their challenges to Commission determinations have not been condemned as "repudiation of their promises." Nor have those similar errors been delineated as "fraud." It is further apparent that the General Counsel ignores the First Amendment to the Constitution, where "right to petition," includes access to the courts. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

Counsel for Petitioner equates the statutory obligation of a candidate to repay matching funds (see 26 U.S.C. §§

9036-9038, Pet. 5) with the obligation of his committee to pay a fine negotiated by the committee. Such an interpretation just isn't justified by the Congressional history nor the plain language of the statute.

The Commission obviously has been upset that Mr. LaRouche and his various committees in four elections have challenged some of its rulings and investigations. While both sides to these quarrels may be charged with exaggeration and excessive rhetoric, such lawsuits and varying legal positions must be viewed in the context of a new law (first effective in 1976), an inexperienced Commission and staff, and a candidate whom the petitioner did not consider "mainstream" in the political spectrum. Even so, candidate LaRouche's record of compliance with the Act differs in no respect unfavorably from that of nearly every other candidate who has received presidential primary matching funds. The facts of Mr. LaRouche's four earlier presidential campaigns ought therefore to speak for themselves, unencumbered by invidious and subjective rhetoric.[1] Specifically:

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[1] The FEC itself bears a responsibility for igniting fires of controversy and suspicion where nothing but routine, technical, and universal campaign problems or errors previously existed. As Judge Brieant first noted this process in *Dolbeare v. FEC*,

> [i]t would be hard to imagine a more abusive visitation of bureaucratic power, than has already been imposed upon this [...] group,

and:

> We doubt that the Congressional sponsors [of FECA and Matching Payment Account Act] ever expected or intended that a volunteer political group would become so enmeshed in governmental red tape and bureaucratic nitpicking, as to be visited with as many MUR's ["Matters Under Review"] and separate investigations as have been visited upon these plaintiffs, without prompt conclusion.

Memorandum and Order, *Dolbeare et al. v. Federal Election Commission*, 81 Civ. 4468-CLB (S.D.N.Y. April 15, 1982), at 38-39. See Joint Appendix Court of Appeals at 99-100.

2. Facts of the 1976 Campaign

LaRouche did not receive matching funds in the 1976 election. Though the Commission pursued a six-year investigation, no allegations of campaign law violations arising from that campaign were ever brought to court. All allegations were officially closed with a conciliation agreement in November 1982, that recited events arising solely from the 1980 campaign.[2] As to the court opinions cited in the petition, *e.g.*, *Committee to Elect LaRouche v.*

Despite the rebuke, the FEC has continued to devote substantial resources to inconclusive investigations of LaRouche's campaigns and efforts to bar his access to campaign funding (see factual recitation below). At the same time, it dropped its case against a political opponent of Mr. LaRouche's, when despite undisputed findings by the FEC that the Anti-Defamation League had made illegal expenditures in opposition to a LaRouche candidacy, it deemed the ADL's "sympathetic posture" sufficient reason not to bring these violations to court. Similarly, over the vehement opposition of two Commissioners, the FEC aborted its investigation of the 1984 Mondale campaign, concerning potentially millions of dollars in violations, on the grounds that the investigation might be too large. Precisely because of the harm that subjective judgments can wreak in the sensitive First Amendment area, both Congress and the courts have insisted on objective criteria for Commission functioning, notwithstanding the deference doctrine.

[2] The statute provides that "a conciliation agreement, unless violated, is a **complete bar** to **any further action** by the Commission," 2 U.S.C. § 437g(4)(A)(i) (emphasis added). This has not stopped the FEC from alleging, every time Mr. LaRouche has subsequently applied for matching funds, that his campaigns committed "fraud" in 1976. The Conciliation Agreement itself, as executed by the Commission, reaffirms this statutory mandate of closure: "It is the understanding of the Respondent and the Commission that the execution of this agreement will result in the termination of all pending Matters Under Review concerning the respondent as of the present date, and that this agreement **constitutes complete satisfaction of all such pending Matters Under Review**" (emphasis added) See, Supplementary Attachment, LaRouche Reply Brief in Court of Appeals

Federal Election Commission, these merely upheld the Commission's right to conduct an investigation of the campaign's matching funds qualifying ("threshold") submission based on the appearances of that submission. No finding was made that any "fraud" or other misrepresentation had in fact occurred. Since there were no matching funds, no agreement existed that could be "repudiated."

3. Facts of the 1980 Campaign

Though the Commission conducted an extensive investigation of this campaign as well, all allegations and suppositions were abandoned in the conciliation agreement that closed the case, except a total of $26,227.64 in conciliated infractions. Of this, $22,103.48 concerned excessive contributions from a number of individuals -- a level of this type of violation **far** less than that of most other publicly funded presidential candidates in that or any other election. The "knowing and willful" instance that Petitioner repeatedly cites, contained in this same conciliation agreement, amounts to $4,664.58, out of a total in contributions raised of $1,450,000 and contributions matched of $526,000. This violation moreover is attributed solely to the campaign committee ("through its volunteers")[3], not even

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[3] It is noteworthy that Mr. LaRouche's campaigns, from 1976 through 1992, have always been staffed by nonprofessional volunteers, who though seeking advice of qualified legal and accounting professionals, have never had the background or resources characteristic of the larger, more "mainstream" candidates. On this basis, nonetheless, as Counsel for the Commission noted in his brief in the Court below, the LaRouche campaign in 1992 raised well over $1 million. Over 7,000 individual donations made up these funds. Noticeably absent have been contributions from corporate or labor organization political action committees ("PACs"), or so-called "bundled" or "soft money" contributions from close circles of corporate or partnership executives.

to the committee's treasurer, as is customary, still less to Mr. LaRouche himself, notwithstanding Petitioner's attempt to imply that even this minuscule violation can be laid at his personal doorstep.

Respondent does not challenge Petitioner's claim that presidential primary candidates are obliged under the Act to take personal responsibility for complying with the provisions of the Act. This reasonable and statutorily mandated responsibility does not extend, however, to a candidate's being personally charged with infractions committed, or thought to have been committed, by his campaign committee or its officers, employees, or volunteers. Petitioner, to the contrary, seeks to expand the statute by subtle rhetorical devices, in the case of Mr. LaRouche and no other candidate. See, *e.g.*, the patently false claim that "matching payments are paid **directly** to the candidate" (Pet. 5, emphasis added), as if the entire mechanism of campaign **committees**, and treasurers as their accountable officials, had been wiped from the statutes. See 26 U.S.C. § 9036.[4]

The 1982 conciliation agreement and associated $15,000 civil penalty, and the circumstances surrounding it, constitute the single event that General Counsel brandishes to create an aura of fifteen years' worth of "campaign law abuse." Such use of the conciliation agreement also flies in the face of the clear congressional mandate that "a conciliation agreement ... is a **complete bar** to **any further action** by the Commission" (see Note 2 above).

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[4] The FEC is hardly likely to charge Senator Paul Tsongas, for example, with "personal" responsibility for the unauthorized use of public funds committed when his treasurer embezzled committee funds in an amount reported to exceed $1 million. FEC *Record* October 1993.

4. Facts of the 1984 Campaign

Petitioner argues that the time elapsed between its Final Repayment Determination, and the 1980 campaign committee's repayment, constitute evidence of a lack of "intention to fulfill" the promises of the candidate letter. Throughout this time, Petitioner was aware that the campaign committee (a) did not possess the funds to make such payment (as revealed in its regular financial disclosure reports), and (b) was actively contesting that determination in Court, as nearly every single candidate faced with repayment determinations has done, throughout the history of the Matching Payment Account Act.

Then, to attempt to give weight to a preposterous assertion, Petitioner cites the Fourth Circuit case on ballot access and the *Spannaus* case in New York where the courts merely in passing *dicta* commented on the actions of the FEC. After making a large "cloud of smoke" over the nonpayment issue -- we find the repayments were, in fact, made!

Petitioner then continues its litany -- Petitioner's own term -- charging Respondent, in the 1984 campaign, with $35,000 worth of unauthorized withdrawals from contributor credit card accounts. This is a case in point of Petitioner's recitation of unsubstantiated allegations as if they were not only fact, but facts at issue in the case. First, to this day, this alleged fraud has consistently failed of proof, though it was extensively tried through documents and witnesses in *United States v. The LaRouche Campaign, et al.*, 695 F.Supp. 1317 (D. Mass. 1988), in which the FEC supplied the prosecution with all of the Commission's own extensive investigative material on this subject. After the case ended in a mistrial, the government dropped all the charges. Petitioner, however, contrary to bedrock principles of the U.S. Constitution and American legal doctrine, continues to cite this now

meaningless piece of paper -- an abandoned indictment -- as if it were a conviction and its contents a fact.

Secondly, even if the alleged unauthorized credit card charges had been proved, it would have had nothing to do with the Matching Payment Account Act. The campaign committee made no attempt to submit any of the contributions in question to be matched by federal funds.[5] Further, the record in the *Spannaus* case cited on p. 9 of the petition indicates that the extent of even the alleged "unauthorized charges" was 1% of the loan sample or 2% of the contributions sample (641 F.Supp. 1520 at 1529) -- again, hardly evidence of a fraudulent scheme. Thus, as with the 1976 and 1980 campaigns, Petitioner's allegation of "repudiated promises" or "fraudulent behavior to obtain matching funds" is empty.

5. Facts of the 1988 Campaign

In 1988 Mr. LaRouche filed for matching funds (Pet 9-10), only to again meet the opposition of the General Counsel. Respondents convinced the Commission to seek written confirmation from the 1000 contributors Counsel had challenged, and after the Audit Division deemed only 43 questionable, the matching funds were approved. As we have observed, since Mr. LaRouche is neither considered "mainstream" by the FEC, nor an incumbent, certain contributors when faced with an official query may well decline to admit to a prior valid contribution. Under such scrutiny the wonder is that the questionnaire return rate was over 70% -- comfortably high by all accepted standards of

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[5] Credit card contributions are ineligible for matching funds by law.

polling and statistical reliability -- and still more remarkable, that the FEC could only find 43 **it** rated questionable. As Chief Justice Burger noted in his concurring opinion in *Buckley v. Valeo*, 424 U.S. 1 (1976), even simple disclosure provisions may deter some individuals who might otherwise contribute and may "think twice" before making even modest contributions to a candidate, at 424 U.S. 237. Again the unwarranted label of "false contribution" is attached even though the FEC has never given Respondents the required notice of the factual basis of the claim, see 437g(A)(2).[6] The claim should be stricken from this petition. The 1988 campaign thus joins the previous three: no "repudiated promises," no "fraud."

6. Conclusion

Commission Counsel's attempt to distinguish Mr. LaRouche's campaigns from those of other presidential primary candidates continues to omit the relevant facts, that (a) the following campaigns were obliged to conciliate campaign law violations in **every presidential primary campaign** in which the candidates participated: Reagan (1976, 1980, 1984); Carter (1976, 1980); and Bush (1980, 1988); and (b) the range of dollar-value of campaign financing violations charged to candidates **other than** LaRouche have ranged from a few tens of thousands of dollars, to **over one million dollars.**

Nor can Mr. LaRouche's campaigns be distinguished as to class of violation. Those conciliated or adjudicated with other candidates include massive abuse of campaign spending

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[6] Although often requested, the FEC has refused to disclose the names of the 43 persons allegedly responding negatively to the mail survey questionnaire, or any unredacted response texts.

limits, acceptance of excessive contributions from individuals, illegal corporate or union contributions, failure or refusal to provide records of campaign depositories to FEC auditors, and attempts to evade campaign spending limits by the creation of "delegate committees" falsely alleged to be "independent." In fact as time has passed since the beginning of public funding, such violations by other candidates have not lessened with experience, but have grown spectacularly. None of these candidates has been charged by the FEC with "repudiating their promises" not to violate campaign finance laws. See, Respondent's Reply to FEC determination, Joint Appendix at 072-075 (also reprinted the Appendix I to this Brief), for a systematic comparison of LaRouche's campaigns with those of all other publicly funded presidential primary candidates from 1976 through 1988.

C. The Court Below Was Unanimous in Repudiating Petitioner's Reliance on and Representation of an Irrelevant Court Decision

Subsection D of Petitioner's petition (Pet. 10-11) should be ignored by this Court. As all three of the Judges below agree, the "only arguably related convictions" (Pet. App. 18a) should not have been any part of the Commission's eligibility determination. Indeed Judge Wald, on whose partial dissent Petitioner relies otherwise, points out in this regard,

> When the Commission **concocts** a theory of liability that relies on the court's denial of the defense motion to instruct the jury on the exclusion of the fundraising practices of political committees, it has strayed not only beyond its area of recognized expertise, but beyond the "circumscribed" inquiry into "patent irregularities" permissible during the certification process (citations omitted, emphasis added).

Pet. App. 14a Note 1.

D. Petitioner Fails to Acknowledge the Relevance of the First Amendment to the United States Constitution

The short shrift Petitioner affords to the First Amendment to the U.S. Constitution well captures the degree of difference between its own view of its authority, and that asserted by Respondent and upheld by the court below. As the Chief Justice (Rehnquist) observed in *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 at 493 (1985), "there can be no doubt that the [Presidential campaign] expenditures at issue in this case produce speech at the core of the First Amendment."

Mr. LaRouche continues to assert positions in the political debate that irritate and stimulate response. The protection, still more, the encouragement, of that behavior is precisely the purpose of the First Amendment and the Matching Payment Account Act: to add to the robust and uninhibited discussion of issues. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).[7] In all campaigns, Mr. LaRouche has offered new approaches to economic problems still facing

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[7] When Mr. LaRouche discussed the drug problem in 1976 and 1980 he identified a problem that "mainstream" politicians did not address until years later. When Mr. LaRouche discussed AIDS and the imminence of epidemics of other diseases, both known and unknown, as well as nuclear energy policies, in 1980 and 1984 he was in advance again. In the 1980 presidential campaign he put forward the missile defense proposals based on "new physical principles" that were subsequently adopted by President Reagan under the title of "Strategic Defense Initiative." In 1988 he discussed the possibility of an imminent reunification of Germany and its implications for strategic and foreign policy, long before the fall of the Berlin Wall, stressing as well the likelihood of major upheavals in the (then) Soviet Union if the U.S. and the West did not adopt a policy of economic and technological cooperation with that part of the world, upheavals that are now reaching ever-greater dimensions.

our present leaders. Though his discussion of all the issues enumerated in Note 7 (above) have been derided by many, no one can doubt that these views help stimulate the thinking of the voting public. But these views have also have won the enmity of this federal agency, the members of which are selected for participation in the "usual and normal" political activities, and whose numbers are carefully apportioned between the mainstreams of the two ruling political parties. This may well have led, however inadvertently, to a "tunnel vision" that can amount to a partisan abuse of office. Coupled with a General Counsel's office that has shown little regard for the First Amendment (in fact in this case he suggested that *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) eliminated the First Amendment from the interpretation of election matters), it is little wonder that Respondents have fared so badly through the years.

While the court below did not decide the case directly on the Constitutional issue, it noted that First Amendment concerns set forth in previous cases (*Committee to Elect LaRouche v. Federal Election Commission*, 613 F.2d 834, D.C. Cir. 1979, and *In re Carter-Mondale Reelection Committee*, Inc. 642 F.2d 538, D.C. Cir. 1980) were definitely **not** eliminated by *Regan* (Pet. App. 12a), and rejected Petitioner's claim that First Amendment considerations were irrelevant to the public funding process.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner has simply converted the petition for a writ of certiorari, which is to be addressed to the reasons why this Court should even hear the case, into an argument on the merits of why the Court below was wrong. In an abortive attempt to "bootstrap" themselves into this Court, they assert a "conflict among the circuits" in the pure *dicta* of the Fourth Circuit in its ballot access case of *LaRouche v. State Board of Elections*, 758 F.2d 998 (4th Cir. 1985) and the *Spannaus* case in New York (Pet. 17).

Rule 10.1 of this Court points out that review by writ of certiorari is not a matter of right, but of judicial discretion. The rule requires "special and important reasons" for approval, and though not controlling, one of the reasons for granting the writ is a conflict between decisions of various courts of appeal **on the same matter**, Rule 10.1(a). Petitioner in a brazen bit of obfuscation to satisfy the Rule's requirement, asserts, "The decision of the majority below conflicts with the **views** of two other courts," Pet. 17 (emphasis added). The first alleged "conflict" is the 4th Circuit decision in *LaRouche v. State Board of Elections*, 758 F.2d 998 (4th Cir. 1985). Not only is that case inapposite but it is even factually wrong. In 1984, after initially denying funding to Mr. LaRouche -- long enough to deny him ballot access in North Carolina and some other states -- the FEC did, in fact grant matching funding under the Act. Therefore there is no conflict between the Circuits in the ruling for which the Commission seeks certiorari.

The second case cited by Petitioner is even more wide of the mark. *Spannaus v. Federal Election Commission*, 641 F.Supp. 1520 (S.D.N.Y. 1986) was an attempt to curtail what plaintiffs charged were bad faith investigations by the Commission into individual contributors to the 1980

campaign. As the District Court notes in his opinion, the LaRouche Campaign was eligible to receive matching funds on April 12, 1984, at 1524. Since the Court was in no way faced with the issues before the court below, its gratuitous remark that the "Commission's decision appears to be legally sound" (at 1526) is not in conflict with the opinion at bar.

It is further well settled that this Court does not sit as a court of error over the federal courts of appeals. Certainly Petitioner cannot claim that the court below "departed from the accepted and usual course of judicial proceedings" requiring this Court's power of supervision. The opinion of the court of appeals follows usual and standard methods of statutory construction. The opinion gives deference to previous cases and even "**assumes**" for the purposes of the case "the Commission's findings of past misconduct" (Pet. App. 4a). It need hardly be said, Respondents emphatically disagree with the Commission's views and the Court's assumption. But given all the benefit of the doubt, the Court held that the statute just does not empower the Commission to do what the General Counsel has advised.

In fact, in the transcript of the meeting at which the Commission denied the 1992 matching funding (Court of Appeals Joint Appendix, p. 171 *et seq.*) the various Commissioners expressed comments such as:

- "I think if the committee came back at the next stage and could demonstrate the legality of these contributions, I would be hard pressed not to, to grant them that money";

- "...he was not criminally convicted of violations of Title 26, ... I don't believe his campaign was guilty of anything";

- "these past bad acts are the whole argument, since the 1992 candidate agreement is error-free on its face, and the 1992 threshold submission seems error-free on its face";

- "...if we're going to take the position that anybody who has gone through the process and has had those kinds of violations is going to be deemed by us ineligible, I don't think it's going to fly, and it would, we might have to reconsider some eligibility determinations we've already made this time around."

Even the General Counsel opened his remarks at that meeting by saying, "... it is my understanding that based on the Audit Division's review, that on its face the submission looks adequate." Certainly with even the Commission's reluctance to follow the General Counsel in the record, the Petitioner cannot claim that the Court below needs judicial supervision. As this Court said in *Rice v. Sioux City Memorial Cemetery, Inc.* 349 U.S. 70 at 74, 75 Sup.Ct. 614,

> a federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants (citations omitted).

Petitioner also exaggerates the opinion of the court below, in claiming that the court:

> ruled instead that the statute requires the Commission to certify for public financing **any** candidate satisfying the other eligibility criteria who submits the prescribed promises written in the proper form -- no matter how lengthy, consistent, and purposeful the candidate's

> record of repudiating the same promises in past election campaigns.

Pet. 16.

A reading of the opinion will disclose the inaccuracy of Petitioner's accusation.

Respondents suggest that if the FEC wishes to make changes in the law to justify its actions here it should be addressed to Congress. Indeed the Commission did just that in the past several times, and though Congress has accepted some requested amendments to the Act and approved a great many new and modified regulations, it has regularly ignored the request that the Commission be authorized to deny funding based on "past actions." In the *1990 Annual Report* to Congress and the President, the Commission argued that there was a "need to ensure that candidates who have wilfully violated laws relating to the public funding process will not be eligible for [future] public funding." The report continues:

> With regard to the candidate's past experience with the public funding process, **neither** of the Presidential public financing statutes places any limitation on eligibility for funding based upon a candidate's prior violations of law, **no matter how severe.... For example, if a candidate has been convicted of fraud** with respect to raising funds for a campaign that was publicly financed, the Commission should not be required to certify funds for future campaigns (emphasis added).

Federal Election Commission, *1990 Annual Report* at 38; see also *Annual Report* for 1989, 1991, 1992.

This construction of the statute was made by the same General Counsel that now seeks certiorari based upon

Commission actions 180 degrees at odds to that conclusion. His remedy should not be found here.

Respondents further believe that review of this case is unnecessary because its precedential impact is minimal.[8] The constitutional issues were subordinated to the statutory interpretation, and as already mentioned previously on page 18, the Petitioner has in the past at least four times sought Congressional action to give them the power they took in the case at bar (without avail).

Counsel for Petitioner further attempts to confuse the issue as set forth by the court below in his argument concerning interpretation of *Chevron, U.S.A. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984) (Pet. 18), suggesting that the court below failed to afford sufficient judicial deference to the agency. As this Court said in *Chevron*, however,

> First, always, is the question whether Congress has directly spoken on the precise question at issue. If the intent of Congress is clear, that is the end of the matter.

The Court of Appeals clearly examined the statutes and Congressional intent and determined, based on the clarity of the statute (Pet. App. 13a), that

> ... the Commission is not authorized to appraise candidates' good faith, honesty, probity or general

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[8] General Counsel seems to challenge the Circuit Court's decision only in application to this case, in effect challenging the **factual** situation and not legal conclusions of the Court. Rule 10 does not envision the Supreme Court's duty to review factual situations.

> reliability when reviewing the agreements and other forward-looking commitments required by [§] 9033(a) & (b).

As to Petitioner's argument that the court below "acknowledged" that deference is due to the Commission's construction of its regulation 11 C.F.R. § 9033.4(b) (Pet. 18), in fact the court all but voided the regulation (Pet. App. 6a):

> We may dispose at the outset of the Commission's reliance on one of its regulations, 11 C.F.R. § 9033.4(b)....

because, *inter alia*,

> the regulation does not even purport to answer the question before us. It permits the Commission to consider information that is "relevant to a determination regarding the candidate's eligibility", but doesn't attempt to define what subjects are relevant. Even if it did, the regulation would of course be valid only to the extent that it conformed to the statute.

Petitioner proffers as a final reason why a writ should issue, that "the decision below is likely ... to undermine the success of this important program" (public funding of presidential campaigns) because the decision "can only diminish public confidence in the integrity of the program." Pet. 24-25. This is a political argument, not a legal one, reflecting an improper motivation that this Court should not legitimize. It is for the Congress, not the Commission or a Court, to consider the impact of its legislation on public opinion. Indeed, the Commission has submitted this same argument to Congress in every Annual Report from 1989 through 1992; and, as noted above, Congress has repeatedly

refused to grant the FEC that authority which the agency has nonetheless arrogated to itself in this case.

CONCLUSION

The statutes and cases do not grant the Federal Election Commission authority to deny eligibility for primary matching funds if the statutory requirements are met. No construction of the laws can produce such an interpretation. Petitioner has repeatedly asked Congress for the authority it seeks to uphold here and Congress has refused. Prompt and even-handed funding to all candidates based upon specific criteria spelled out by Congress is required in this field because of First Amendment considerations inherent in public campaign financing. Petitioner's exaggeration and misrepresentation of fact should not be countenanced and General Counsel should be admonished.

Further, the writ should be denied for failure to meet the requirements of Rule 10 of the Rules of the Supreme Court of the United States. For these and other reasons stated above the Federal Election Commission's petition for a writ of *certiorari* should be denied.

Respectfully submitted,

—James F. Schoener, Esq.
Richard Mayberry, Esq.

Attorneys for Respondents

APPENDIX

Table 1.

Publicly-Funded Candidates: Campaign Violations on the Public Record

This table identifies presidential candidates receiving public funding, showing for each the number of MURs that resulted in findings of campaign law violations. Only those MURs are shown that were resolved by conciliation or court finding; those that were closed without conciliation or penalty are excluded, as are those that may still be open and hence not disclosed to the public.

Only primary election campaigns are shown; general election campaigns would add further MURs (e.g., an additional MUR for each of the two Reagan-Bush general campaigns).

Candidates are listed alphabetically starting with the 1976 campaign. Those that ran in more than one election cycle are carried forward on the same line. When candidates appear for the first time, they are listed alphabetically under the year in which they first campaign. Note that the "Jackson" running in 1976 is the late Sen. Henry Jackson, not Jesse Jackson.

Table 1 (cont'd)

Candidates per election, with number of conciliations

1976	1980	1984	1988
Bayh			
Bentsen			
Brown[1]	Brown		
Carter[1]	Carter[1]		
Church[1]			
Ford[1]			
Harris[1]			
H.Jackson			
LaRouche[1]	LaRouche[1]	LaRouche	LaRouche
McCormack[1]			
Reagan[1]	Reagan[2]	Reagan[1]	
Sanford			
Shapp[1]			
Shriver			
Udall[1]			
Wallace[1]			
	Anderson[1]		
	Baker		
	Bush[1]		Bush[1]
	Crane[1]		
	Dole[1]		Dole[1]
	Kennedy[1]		
		Askew[1]	
		Cranston[2]	
		Glenn[1]	
		Hart[1]	Hart

Table 1 (cont'd)

1976	1980	1984	1988
		Hollings[1]	
		Jackson[2]	Jackson[1]
		McGovern[1]	
		Mondale[2]	
			Babbitt[1]
			Biden
			Dukakis
			DuPont[3]
			Gephardt
			Gore
			Haig[1]
			Kemp[1]
			Robertson
			Simon

Table 2. Expenditures in Excess of State Limits ($)

		1976	1980	1984	1988
Carter	IA		45,514		
	ME		28,07		
	NH		24,704		
Cranston	NH			106,924 (13%)	
Dole[3]	IA				306,730 (40%)
	NH				302,949 (66%)
Dukakis[3]	IA				281,001 (36%)
	NH				58,835 (13%)
DuPont	IA				85,842 (11%)
Gephardt[3]	IA				495,718 (64%)
Glenn[2]	IA			149,421 (22%)	
	NH			218,881 (54%)	
Kemp[3]	IA				114,680 (15%)
	NH				73,920 (16%)
Kennedy[1]	IA		13,562		
	NH		4,972		
LaRouche	NH		36,586		58,936 (13%)
Mondale	IA			147,364 (22%)	
	NH			128,333 (32%)	
	ME			25,283 (6%)	
	Overall			578,904	

		1976	1980	1984	1988
Reagan	NH	30,285			
[1]	NH		18,830		
Simon[3]	IA				909,962 (117%)
	NH				224,850 (49%)
Udall	NH	9,694			

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1 Reduced to this amount by litigation.

2 Per MUR 2072. This case was also litigated, prior to reaching conciliation.

3 Per Final Audit Report or *FEC Record* citation of Final Audit Report